a plaintiff or defendant may be made to the court or a judge at any time before trial, by summons, or at the trial of the action in a summary manner".

This rule has to be read with Order XVI, rule 11(2), which provides as follows:

"The court or a judge may at any stage of the proceedings either upon or without the application of either party, and on such terms as appear to the court or a judge to be just, order that the name of any parties improperly joined, whether as plaintiffs or as defendants, be struck out, and that the names of any parties, whether plaintiffs or defendants, who ought to have been joined, or whose presence before the court is necessary in order to enable the court effectually and completely to adjudicate upon and settle all the questions involved in the cause or matter, be added".

Furthermore counsel for the plaintiffs obtained an order dispensing with service of the amended writ and statement of claim under Order XVI, rule 13, which reads as follows:

"Where a defendant is added or substituted, the writ of summons shall be amended accordingly, and the plaintiff shall, unless otherwise ordered by the court or a judge, file an amended copy of the writ as amended, and serve the new defendant with such amended writ or notice in lieu of service thereof in the same manner as original defendants are served, and the proceedings shall be continued as if the new defendant had originally been made a defendant".

I accept the submission of counsel for the defendants that the order of the 3rd April, 1964, was made under Order XVI, rule 11. In my judgment, the substitution of Swedish East Asia Co. Ltd. as defendants in place of Malaya Indonesia Line by that order was not the correction of a mere misnomer: it involved the addition of Swedish East Asia Co. Ltd. as a new party in replacement of the party that was removed. By Order XVI, rule 11(4) the proceedings as against Swedish East Asia Co. Ltd. shall be deemed to have begun only on the service of the writ on them. As service of the writ on them was dispensed with, it seems to me that for purposes of limitation the proceedings as against Swedish East Asia Co. Ltd. must be deemed to have been instituted when they were made a party, that is, on the 3rd April, 1964. As the period of limitation expired within a few days of the 15th February, 1964, I come to the conclusion that the plaintiffs' claim against the present defendants is barred by limitation. For the above reasons I dismiss this action with costs.

Action dismissed.

Solicitors: *Allen & Gledhill; Donaldson & Burkinshaw.*

KUO CHEN SUAN v. WILLIAM K. KWIK & ANOR.

[O.C.J. (Winslow J.) June 22, 1965]

[Singapore — Motion in Suit No. 828 of 1964]

Practice and Procedure — Commission payable to sheriff — Debtors Ordinance (Cap. 13), s. 17 — R.S.C. 1934 O. LX rr. 19 and 20 and Schedule B Item 117.

The plaintiff on an *ex parte* application obtained an order on May 27, 1964 under section 17 of the Debtors Ordinance that the sum of $100,000 received by the United Chinese Bank Ltd., be taken into custody by the sheriff as a pledge or security to cover the claim of the plaintiff until trial of the action and final judgment and satisfaction thereof. The sheriff demanded and received payment of the said sum. Subsequently the said bank who were not a party to the proceedings but who were affected by the order of May 27, 1964 applied on June 6, 1964 for an order to set aside the order of May 27, 1964 which was granted. The new order directed the sheriff to return the sum of $100,000 to the bank. It also ordered that the costs of the application should be taxed and paid by the plaintiff to the bank. The sheriff refunded the sum of $100,000 less a sum of $4,000 which he claimed to be the commission due to him under Item 117 of Schedule B to the Rules of the Supreme Court. This sum was allowed as a disbursement in the bill of costs submitted by the bank for taxation by the registrar but on appeal was disallowed by the judge who observed that the sheriff had not complied with the order of June 6, 1964 and the sheriff was not entitled to charge under Item 117 as it was not the money of the debtor. The question raised on the motion was whether the sheriff was entitled to deduct the sum of $4,000 as his fee.

Held: (1) the mandatory provisions of Order LXIV for deducting the sheriff's commission under Item 117 of Shedule B to the Rules come into play only when the money ordered to be attached by an order under section 17 of the Debtors Ordinance is clearly shown to be money belonging to a debtor. Section 17 empowers an order to be made *ex parte* and such an order does not resolve the question of ownership of the money in question for all time;

(2) the proper procedure in this case would have been that laid out in Order LX. If that procedure had been complied with the money in the hands of the bank could only have been seized by a garnishment notice, thereby giving the garnishee an opportunity to have the question of their liability to deliver up the money to the sheriff determined by a court or a judge. The sheriff then could have interpleaded under Order XLV;

(3) the commission should be returned by the sheriff to the bank without any order for attachment against him for contempt.

Case referred to:—

(1) *Bullen* v. *Ansley and Smith*, 170 E.R. 84.

MOTION IN SUIT.

K. S. Chung for the applicants (United Chinese Bank Ltd.).

Tan Boon Teik (Solicitor-General) for the sheriff.

Cur. Adv. Vult.

Winslow J.: On 27th May, 1964 Ambrose J., on an *ex parte* application by the plaintiff under section 17 of the Debtors Ordinance (Cap. 13), ordered that "a sum of $100,000 received by the United Chinese Bank Limited '(hereinafter referred to as the applicants)' of No. 2 Chulia Street, Singapore, for and on behalf of the 1st defendant and belonging to the 1st defendant from the Accountant-General, Singapore, be forthwith secured and taken into the custody of the sheriff as a pledge or security to answer the just claim of the plaintiff until the trial of the above action and judgment and satisfaction thereof", and also ordered "that the sheriff of

the High Court of Singapore do secure and take the said sum of $100,000 from the said United Chinese Bank Limited of No. 2 Chulia Street, Singapore".

Acting on this order the sheriff forthwith demanded and received the said sum of $100,000 from the applicants.

On 6th June, 1964 the latter, who were not a party to the proceedings but were affected by the order of 27th May, 1964, applied to have the said order set aside. Acting under the provisions of Order LIII rule 4 of the Rules of the High Court, taken in conjunction with section 18 of the Debtors Ordinance (which empowers the court or a judge to order any movable property seized to be returned upon such terms as seem just) Ambrose J., after hearing the plaintiff and the applicants, set aside his former order of 27th May, 1964 and further ordered that the sheriff should repay the said sum of $100,000 to the applicants forthwith. It was also ordered that the costs of this application should be taxed and paid by the plaintiff to the applicants.

On 12th June, 1964 the sheriff refunded the said sum of $100,000, less a sum of $4,000 which was deducted from the said sum of $100,000 as the commission due to him under Item 117 of Schedule B to the Rules which reads as follows:—

"117. Commission of 4 per cent to be charged on all money received by the sheriff under an order for the attachment before judgment of money belonging to the debtor in the hands of a third party".

When the applicants' bill of costs was taxed, it included this sum of $4,000 as a disbursement made by the applicants which they claimed should be taken into account as against the plaintiff. The registrar allowed this disbursement to be claimed and the matter went before Chua J. on appeal against his decision on this point. After hearing counsel for the plaintiff and the applicants Chua J. decided on 30th September, 1964 to allow the appeal, observing —

"Sheriff had not complied with order of 6th June 1964 and sheriff in my view not entitled to charge under item 117 as it is not money of the debtor. Item 63 disallowed".

I have to decide now whether the sheriff was entitled to deduct $4,000 as his fee on 12th June, 1964 having regard to the order made by Ambrose J. on 6th June, 1964 requiring the whole of the said sum of $100,000 to be repaid to the applicants.

It was contended by the learned Solicitor-General on behalf of the sheriff that, on the authority of *Bullen* v. *Ansley and Smith*,[1] the sheriff was entitled to retain his fee notwithstanding the fact that the order of 27th May, 1964 had been set aside, and I was at one stage sufficiently attracted by this argument to think that perhaps this was a complete answer to the bank's application. It was also contended that Chua J.'s observations above were *obiter* and not binding on me, the sheriff not having been a party to the appeal.

I have carefully considered all aspects of this case, however, with a view to discovering the root cause of the impasse which has arisen because both the applicants and the sheriff cannot both be right in their view of the law on the subject and I must try and reach a conclusion which can be reconciled with the order made by Ambrose J. on 6th June, 1964 which is clear and final. What is it that this order requires to be done? It requires the sheriff to repay the said sum of $100,000 to the applicants forthwith. It is silent on the question of the sheriff's fee or commission of 4 per cent and I do not think I can assume that, merely because the sheriff was not before him, he overlooked it. The court had power to release the money on such terms (if any) as seemed just and its attention had been drawn to its powers.

It seems to me that the mandatory provisions of Order LXIV for deducting the sheriff's commission under Item 117 of Schedule B to the Rules come into play only when the money ordered to be attached by an order under section 17 of the Debtors Ordinance is clearly shown to be money belonging to a debtor. Section 17 empowers an order to be made *ex parte*. Such an order does not, in my opinion, resolve or pretend to resolve the question of ownership of the money in question for all time. It is perhaps unfortunate that the order of 27th May, 1964 was couched in such terms as to lead the sheriff to believe that an irrevocable finding had been made to the effect that the money in this case belonged to the debtor, which of course the order could not make, having regard to the procedure prescribed by Order LX which sets out the rules regulating practice and procedure under the Debtors Ordinance.

All counsel concerned in this case, as well as the sheriff, appear to have overlooked the provisions of Order LX rules 19 and 20 which read as follows:—

"19. Any property liable to seizure under Part III of the Ordinance shall be seized in the manner prescribed for seizure under a writ of seizure and sale.

20. Any claim by a third party to property seized under Part III of the Ordinance shall be dealt with in the manner prescribed by Order XLV relating to proceedings by way of interpleader".

If this procedure had been complied with the money in the hands of the applicants could only have been seized by a garnishment notice under Order XLI rule 4 and the provisions of Order XLIII relating to garnishment would have applied so as to enable a garnishee, such as the applicants, to have the question of their liability to deliver up the money to the sheriff tried or determined by a court or a judge. The sheriff

himself could have interpleaded in the manner prescribed by Order XLV.

In view of the fact that this procedure was not followed the applicants were called upon to pay the money over to the sheriff in circumstances where they could validly have refused to do so and asked for the issue to be tried. They, however, paid up and sought to get the order of 27th May, 1964 set aside.

I have come to the conclusion that, if the correct procedure had been followed, the sheriff would not have found himself in his present position and that if the applicants had seen the flaw in the procedure they could have easily avoided getting themselves involved in the matter as they did.

The sheriff is an officer of the court and so is the registrar. It so happens that these offices are sometimes vested in the same person and that that officer performs dual functions without necessarily having to develop a "split personality". When the registrar received the draft of the order of 6th June, 1964 for approval there was nothing to prevent his drawing the judge's attention to Item 117 before allowing the order to be taken out. I do not think that any allegation of impropriety could have been made against the registrar for taking such a course because he would merely be attempting to draw the judge's attention to some mandatory provision of the law which he thought everybody had overlooked. The judge would then, if necessary, have considered the matter and either confirmed his order or recalled the parties with a view to considering what his order should be in view of this new aspect. There is authority, I think, for the proposition that before an order is actually taken out it may be reconsidered in a case where some matter of prime importance appears to have been overlooked.

Whether I am right or wrong in the observation in the preceding paragraph I am satisfied that the present impasse arose through failure to comprehend the true effect of the order of 27th May, 1964 on the part of all concerned.

In the circumstances I propose to give a direction to the sheriff that the commission in question should be returned to the applicants without my making any order for attachment against him for contempt, and I do not, therefore, propose to make any order as to costs.

Order accordingly.

Solicitors: *Chung & Co.*

RE MUTHUKARUPPAN CHETTIAR DECD.

[O.C.J. (Hepworth J.) May 7, 1965]

[Penang — Originating Petition No. 4 of 1964]

Revenue — Estate duty — Gift inter vivos by testator by way of deposit of moneys in firm — Gifts confirmed by declarations of trust and last will of testator — Passing of property on death — Whether testator as trustee had bona fide possession and enjoyment of property — Whether testator retained property to the entire exclusion of himself as donor — Estate Duty Enactment, 1941, s. 5(iii).

In 1954 the deceased who was a partner in a chettiar firm caused a sum of $15,000 to be placed on fixed deposit with the firm for each of the four infant children of the petitioner, his adopted son. In 1955 the deceased confirmed the gifts by separate documents referred to as deeds of trust. The deceased died on October 20, 1961 and by his will dated April 12, 1961 the deceased further confirmed the gifts to the infants. The collector of estate duty who is the respondent, claimed and obtained estate duty on the said gifts on the ground that the gifts *inter vivos* were deemed to be property passing on the death of the deceased within the meaning of section 5(iii) of the Estate Duty Enactment. The petitioner maintained that this was wrong because (a) the gifts were perfected by the declarations of trust (b) *bona fide* possession and enjoyment of the gifts were assumed by the donees through the donor as trustee immediately on the execution of the declaration of trust and (c) such possession and enjoyment were thenceforth assumed by the donees through the donor as trustee to the entire exclusion of the donor.

Held: the deceased did on the facts of this case assume *bona fide* possession and enjoyment of the gifts as trustee immediately on the execution of the declarations of trust but as these sums were used generally in the running of the business of the firm of which the deceased was a partner the deceased could not be said in fact to have been excluded from the property under section 5(iii) of the Enactment because as a partner he enjoyed rights over it. The sums therefore on fixed deposit in the said firm in the names of the infants at the date of the deceased's death were sums which were deemed to pass on the death of the deceased by virtue of the said section of the Enactment.

Cases referred to:—

(1) *Vandenberg* v. *Palmer* (1858), 70 E.R. 85.

(2) *Attorney-General* v. *Grey* [1898] 2 Q.B. 534.

(3) *Attorney-General* v. *Seccombe* [1911] 2 K.B. 688.

(4) *Jeffreys* v. *Jeffreys* 41 E.R. 443.

(5) *Milroy* v. *Lord* 45 E.R. 1185.

(6) *Re Wale* [1956] 3 All E.R. 280.

(7) *Gould* v. *Commissioner of Stamp Duties* [1934] A.C. 69.

(8) *Kumarappa Chettiar* v. *Federated Malay States* [1938] M.L.J. 9; [1937] F.M.S.L.R. 56.

(9) *Chick* v. *Commissioner of Stamp Duties of New South Wales* [1958] A.C. 435.

(10) *Commissioner of Stamp Duties of New South Wales* v. *Permanent Trustee Co. of New South Wales* [1956] A.C. 512.

(11) *Commissioner of Stamp Duties of New South Wales* v. *Owens* (1953), 88 C.L.R. 67.

(12) *O'Conner* v. *Commissioner of Stamp Duties (South Australia)* (1932), 47 C.L.R. 601.